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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 390

RALPH T. BRENGLE,
Petitioner and Appellant Below,

vs.

JOHN E. NEWMAN, D/B/A NEWMAN KRAUSE COMPANY,
Respondent and Appellee Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Questions Presented for Review	1
Statement of the Case	4
Reasons for Refusing the Writ	10
Argument	11
Conclusion	16

List of Authorities Cited.

Asher v. Ruppa (7th Cir.) 173 F. 2d 10, at page 12	15
Atkinson v. New Britain Machine Co. (7th Cir. 1946) 154 F. 2d 895, p. 901	14
Bayer v. Oxford University Press, Inc. (1946) 61 N. Y. Supp. 2d 209	14
Estes v. Anderson Oil Co. (1931) 93 Ind. App. 365, 176 NE 560, at page 562	11
Groome v. Freyn Engineering Co. (1940) 374 Ill. 113, 28 N. E. 2d 274 (15) at p. 282	14
Michigan Chemical Corpn. v. G. W. Frady, et al. (1955) 289 Pac. 2d 363	14
Ohio Marble Co. v. Byrd (6th Cir. 1933) 65 F. 2d 98	14
Patten v. Dennis, U. S. Attorney, 134 F. 2d 137	14
Pierce v. Wagner, 34 F. 2d, 958	14
Reissner, et al. v. Oxley, et al. (1881) 80 Ind. Supreme Court 580, at page 584	12
Singer Mfg. Co. v. Brewer (1906) 93 S. W. 755	14
Van Praag v. F. R. Corporation (1947) 73 N. Y. Supp. 2d 82	14

Vulcan Iron Works Co. v. Electric Magnetic Gold Mining Company (1913) 54 Ind. App. 28; 99 N. E. 429, at page 432 12

53 Am. Jur. "Trial", Section 270, pp. 228 and 230 11

Abbreviations.

Deft.-Aplnt. Brengle Apx.....
.....Appendix for defendant-appellant (Brengle)

Ptf.-Aple. Newman Apx.....
.....Appendix for plaintiff-appellee (Newman)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 890.

RALPH T. BRENGLE,
Petitioner and Appellant Below,

vs.

JOHN E. NEWMAN, D/B/A NEWMAN KRAUSE COMPANY,
Respondent and Appellee Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW.

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a. No question was presented to USCA, 7th Circuit, on "motion to dismiss". Petitioner Brengle in his brief to the Court of Appeals, page 10, under "Contested Issues" presented:

"5. The Court erred in overruling appellant's first

defense that Count One (1) of amended complaint fails to state a claim against the defendant, Brengle, upon which relief can be granted."

Petitioner Brengle sets forth a false premise in an effort to sustain his contention that the amended complaint does not state a claim against him, and attempts to leave an inference that he is not linked with the claim. To readily recognize petitioner's error, attention is respectfully invited to the amended complaint, Count One, beginning on page 6 of Deft.-Aplnt. Brengle Apx., and the contract signed by petitioner Brengle, beginning on page 11 of Deft.-Aplnt. Brengle Apx., which was made a part of the amended complaint as "Exhibit A". The contract was prepared by Brengle. Ptf.-Aple. Newman Apx., p. 98, Q. 185.

Count One of the amended complaint (Deft.-Aplnt. Brengle Apx., p. 6) was against both defendants, Brengle and Potter & Brumfield. "The plaintiff complains of the defendants and avers:" Both defendants are included in averments in rhetorical or literary paragraphs 1, 2, 3, 4, and 5. The demand for judgment was against both defendants. The contract (Deft.-Aplnt. Brengle Apx., p. 11), which formed the basis of the suit was *signed by R. T. Brengle, without designation*, and a copy was made a part of the amended complaint as "Exhibit A". The answer of defendant-petitioner Brengle begins on page 14 of Deft.-Aplnt. Brengle Apx. In his second defense, Brengle says he acted in the capacity of an independent contractor. In his third defense, par. 2, *Brengle admits the allegations contained in rhetorical paragraph 2 of Count One of plaintiff's amended complaint*, that "plaintiff (Newman) was to be the exclusive sales representative of *products sold by defendant Brengle* and manufactured and shipped by Potter & Brumfield within the designated territory * * *."

In the 5th paragraph of his third defense, Brengle admits the allegations of plaintiff Newman's rhetorical paragraph

6 of Count One "That plaintiff has performed all the terms and conditions of said contract by him to be performed.' Brengle in his fifth defense says he paid to Newman all moneys due.

b. Petitioner projects a "loaded" proposition. Generally the construction of a written contract is a question of law for the Court. The question here, however, is whether or not in the case of ambiguity in a written contract, where the parties, by their acts and conduct, have placed a construction thereon, and parol evidence having been introduced by both parties, without objection, explaining the ambiguity and showing such construction, the meaning of the contract, in the light of such parol evidence, in this case, became a question of fact to be determined by the jury.

STATEMENT OF THE CASE.

Respondent takes exception to petitioner's statement of the case in the following particulars:

(a) Again respondent insists that no question was presented to the USCA, 7th Circuit, concerning petitioner Brengle's "motion to dismiss". The question presented was whether or not the Court erred in overruling appellant's first defense that Count One of amended complaint failed to state a claim against defendant Brengle, upon which relief could be granted. (Brief and Argument for defendant-appellant Brengle, page 10, paragraph 5.)

Count One of the amended complaint (Deft.-Aplnt. Brengle Apx., p. 6) was against both defendants, Brengle and Potter & Brumfield. "The plaintiff complains of the defendants and avers:" Both defendants are included in averments in rhetorical or literary paragraphs 1, 2, 3, 4, and 5. The demand for judgment was against both defendants. The contract (Deft.-Aplnt. Brengle Apx., p. 11), which formed the basis of the suit was *signed by R. T. Brengle, without designation*, and a copy was made a part of the amended complaint as "Exhibit A". The answer of defendant-petitioner Brengle begins on page 14 of Deft.-Aplnt. Brengle Apx. In his second defense, Brengle says he acted in the capacity of an independent contractor. In his third defense, par. 2, *Brengle admits the allegations contained in rhetorical paragraph 2 of Count One of plaintiff's amended complaint*, that "plaintiff (Newman) was to be the exclusive sales representative of *products sold by defendant Brengle* and manufactured and shipped by Potter & Brumfield within the designated territory * * *."

In the 5th paragraph of his third defense, Brengle admits

the allegations of plaintiff Newman's rhetorical paragraph 6 of Count One "That plaintiff has performed all the terms and conditions of said contract by him to be performed." Brengle in his fifth defense says he paid to Newman all moneys due.

Nowhere in plaintiff's amended complaint is it alleged that Brengle was acting solely as an agent for defendant Potter & Brumfield, as stated in the petition for writ of certiorari. The amended complaint, first count, rhetorical paragraph 2, does aver among other things "that plaintiff (Newman) was to be the exclusive sales representative of *products sold by defendant Brengle* and manufactured and shipped by Potter & Brumfield, within the designated territory * * *."

(b) The contract does provide as petitioner states that "until the effective date of cancellation hereof, first party will pay second party a sales commission * * *", but petitioner omits the following ambiguous parts of the contract:

> "*against orders invoiced to customers in the territory above described*, except in cases where a different rate of commission is agreed upon by both parties, such payments to be made on or about the 10th day of each month covering shipments made during the preceding calendar month."
>
> "10% commission on all shipments to jobbers or distributors on which is allowed a maximum discount of 33⅓%. *Commissions on sales* to Industrial or Manufacturing accounts will be *7% of net billings.*" (Deft.-Aplnt. Brengle Apx. p. 12.)

There never was a cancellation of the contract in accordance with its terms. It provided:

> "This appointment may be cancelled by either party on thirty (30) days' notice, but shall extend from January 1, 1951, until so cancelled." (Deft.-Aplnt. Brengle Apx., p. 12.)

Actually, defendant-petitioner Brengle gave one day's notice to cancel, as shown by plaintiff's Exhibit 9-A, dated July 31, 1952, and reads in part:

> "In accordance with the terms of our contract, this cancellation becomes effective 1 August, 1952 * * *",

and signed by R. T. Brengle. (Deft.-Aplnt. Brengle Apx., p. 124; offered in evidence Ptf.-Aple. Newman Apx., p. 35.)

The intention of the parties under the ambiguous contract to the effect that there should be no forfeiture of commissions on orders procured from plaintiff's territory and on hand at the factory on the date of attempted termination, regardless of dates when shipments were made, was recognized by defendant-petitioner Brengle, and respondent Newman cites several instances. An oral agreement was entered into between the parties as an inducement from Brengle to Newman to enter into their first written contract (not in suit), whereby plaintiff Newman was to receive relatively small commissions on house accounts then on hand and the commissions were paid irrespective of when shipments were made. (Deft.-Aplnt. Brengle Apx., p. 44, Q. 346-354; p. 46, Q. 361; p. 47, Q. 364, 365; p. 77, Q. 53; p. 80, Q. 68. Ptf.-Aple. Newman Apx., pp. 129-130, Q. 14-17.)

This intention was again recognized when defendant-petitioner Brengle terminated the first written contract (not in suit), dated October 18, 1949, on one year's notice, which termination date was effective December 31, 1950, and commissions were paid on all orders on hand on December 31, 1950, regardless of the dates when shipments were made. (Deft.-Aplnt. Brengle Apx., p. 32, Q. 292, to p. 34, Q. 303.)

Defendant-petitioner Brengle admitted that the contract provided for commissions on sales, and we quote his testimony from Ptf.-Aple. Newman Apx. p. 98:

"Q. 187. Now, I call your attention to what the contract says. See that language there, commissions on sales to industrial and manufacturing accounts will be seven percent of net billing. Now, the contract provided for commission on sales, did it not?"

"A. That so states, yes."

The obligation of defendant-petitioner Brengle that he is the real party to pay the commissions is acknowledged in his communication, found in Ptf.-Aple. Newman Apx., p. 121, and offered in evidence on the same page, a part of which reads:

"The only change is that hereafter Ralph Brengle, as an individual, is responsible for payment of your commissions.

"This obligation is herewith acknowledged * * *."

Defendant-appellant Brengle further testified in chief (Deft.-Aplnt. Brengle Apx., p. 80):

"Q. 68. Was there any discussion, any further discussion in those conversations?"

"A. Yes. The general details of the proposed contract were discussed and agreed upon verbally. One of the factors was that he would be paid commission on all shipments made by the factory in Princeton, Indiana into the so-called number five territory, on and after the effective date of his contract, regardless of when those orders were received by the factory * * *."

Defendant-petitioner Brengle used the words "*all shipments,*" and it was not limited to a part of the shipments or shipments made during any particular period, but on all shipments.

To illustrate further the ambiguity, respondent calls attention to two additional instances: the language of the first paragraph of the contract, as drafted by defendant-petitioner Brengle, reads:

"Ralph T. Brengle, hereinafter called the 'first

party', being the General Sales Manager for products manufactured by Potter & Brumfield Mfg. Co., Inc., an Indiana Corporation * * *."

Obviously, products, being inanimate objects, can have no General Sales Manager.

Reference is made to the testimony of Howard Hightower, Secretary of Potter & Brumfield Mfg. Co. (Ptf.-Apl. Newman Apx. p. 122)

"Q. 20. Now, what was the position of Mr. Brengle?"

"A. Mr. Brengle, as I understand it, was Vice President of Potter & Brumfield Manufacturing Company and was the sole sales agent as general manager for Potter & Brumfield Manufacturing Company."

"Q. 21. He was pretty much the chief cook and bottle washer?"

"A. From the sales end, he was the chief cook and bottle washer."

Defendant-petitioner Brengle received his 15% commission on all sales, but has refused to pay respondent Newman his 7% commission. Richard M. Brumfield, President of Potter & Brumfield, testified:
(Ptf.-Aple. Newman Apx. p. 116)

"Q. 32. That was your understanding. Now, calling your attention to page three, paragraph four, where it provides for 15% commission, has either the Brengle Sales or Ralph T. Brengle been paid that 15% commission?"

"A. Yes."

(Ptf.-Aple. Newman Apx. p. 118)

"Q. 46. Now, under this second contract, Exhibit *ZZZ*, paragraph three, was the Defendant Brengle also to be paid 15% ?"

"A. Yes, sir."

"Q. 47. On the *sales?*"

"A. Yes, sir."

"Q. 49. Now, this commission of 15% that is referred to in these two contracts, that covers the period of time that the Plaintiff is claiming commission for orders that were sent in from his territory, does it not?"

"A. That is correct."

"Q. 50. Now has the Defendant Brengle been paid the 15% on those orders that the Plaintiff Newman—that came in from the Plaintiff Newman's territory?"

"A. I would assume so."

"Q. 51. On all of them?"

"A. I would assume so."

"Q. 52. Do you know whether Newman has been paid?"

"A. No, I do not."

"Q. 53. You do not. So, as far as you know, the 15% commissions that were paid, they stopped with Brengle?"

"A. As far as Potter & Brumfield are concerned, yes."

As one of numerous instances showing that much time was used by defendant-petitioner Brengle to explain his understanding of the ambiguous contract and the actions and interpretation of the parties, he introduced some 66 exhibits. (A to Z; AA to ZZ; AAA to XXX, which may be found in the Exhibits part of the Record.)

The trial Court sustained motion to amend complaint to conform to the evidence, by changing demand from $29,191.34 to $49,178.10. (Ptf.-Aple. Newman Apx., p. 132.) And the verdict of the jury was for $25,140.57. (Dft.-Aplnt. Brengle Apx. p. 153.)

REASONS FOR REFUSING THE WRIT.

1. The decision of the Court of Appeals does not conflict with any decisions of that Court, or any other Court of Appeals, or the Courts of Appeal of Indiana, or this Court.

2. The petitioner fails to point out any error or defect in the proceedings in the trial Court inconsistent with substantial justice.

ARGUMENT.

1. The decision of the Court of Appeals that in this case involving ambiguities in the contract, and where both parties introduced evidence without objection as to the actions, interpretation and construction they placed on the contract, it was proper to submit the question to the jury, and it is not in conflict with applicable Indiana decisions.

In substantiating his viewpoint, petitioner cites 53 Am. Jur. "Trial", paragraph 270, page 229. We quote the following from the same book and paragraph, page 228:

> "WHERE EXTRINSIC EVIDENCE IS INTRODUCED. It is quite uniformly recognized that where a written contract is ambiguous and extrinsic evidence as to intention has been introduced, there exists within the province of the jury some function as to the construction of the contract. Some courts state the rule to be that where a written contract is ambiguous, and extrinsic evidence as to intention has been introduced, the determination of the meaning of the contract becomes a question of fact for the jury in the light of the extrinsic evidence."

and also at page 230:

> "But where the contract is not clear or is ambiguous, and, even though the evidence is not conflicting, and different reasonable conclusions are possible, the question is one for the jury."

Most of the Indiana decisions cited by petitioner do not deal with ambiguous contracts, and this case comes under the exception which is as well founded as the rule itself, and is the law in Indiana, as cited in *Estes* v. *Anderson*

Oil Co. (1931), 93 Ind. App. 365; 176 N. E. 560, at page 562, where the Court said:

> "In case of ambiguity in a written contract, or in case of construction thereof by the parties themselves, disclosed by their actions and conduct in connection therewith, parol proof may be offered explaining the ambiguity, and also establishing such construction, and in such event the question of the meaning of the contract in the light of such parol evidence becomes a question of fact to be determined by a jury."

In *Vulcan Iron Works Co.* v. *Electric Magnetic Gold Mining Company* (1913), 54 Ind. App. 28; 99 N. E. 429, the question of ambiguity was submitted to the jury, who returned a verdict for plaintiff from which an appeal was taken and judgment was affirmed; and the following is quoted from the Court's opinion: 99 N. E. at top of page 432:

> "If the jury properly understood the meaning of the contract, it is not material whether that meaning was adopted from the court, or derived by the jury from a consideration of the contract. The result is the same in either case."

In another leading Indiana case, *Reissner, et al.* v. *Oxley, et al.* (1881), 80 Ind. Supreme Court 580, the Court on page 584 said:

> "While there has been, and is perhaps yet, a difference of opinion among the members of this court, in reference to the interpretation of this contract, if construed without looking beyond its terms, we are agreed that it was proper to leave it to the jury to determine, *under the evidence which was admitted without objection, and, indeed, was adduced by both sides, what construction the parties themselves had placed upon it;* and that, for the purpose of submitting this question to the jury, the instruction which was given is not justly subject to the objections urged against it.

"The right of parties to put an interpretation upon their own contracts, event to the extent of doing away, practically, with the ordinary and plain meaning of terms, can not well be denied, so long as their interpretation does not result in a contract which for some reason is in itself unlawful. And the cases are numerous and consistent, which permit a resort to proof of the circumstances or situation of the parties, when their contract was made, and of their transactions under it, *when its terms are of doubtful or ambiguous meaning, for the purpose of arriving at the true intention, and, when this is done, the question must be left to the decision of the jury substantially as was done in this instance.*" (Our italics.)

As pointed out in respondent's statement of the case, the contract is ambiguous; both parties introduced evidence without objection as to the interpretation and construction placed on the contract; the petitioner Brengle admitted that the contract provided for a commission on sales; that he prepared the contract; that he individually was responsible for payment of the commissions under the contract; and that he gave the purported ineffective notice of cancellation, which provided for one day's notice instead of thirty days, as required by the contract. The evidence further shows as set forth in respondent's statement of the case that petitioner Brengle received his 15% on all the business produced by respondent Newman, but has refused to pay Newman his 7%. The Court permitted an amendment, increasing the demand from $29,191.34 to $48,178.10, to conform to the evidence, and the jury returned its verdict for $25,140.57.

Plaintiff-respondent's obligation was discharged when orders were forwarded to defendant-petitioner, and his commissions had then been earned; and it was not material

that the commissions did not become due until after the purported termination of his contract.

Ohio Marble Co. v. *Byrd* (6th Cir. 1933), 65 F. (2d) 98.

Singer Mfg. Co v. *Brewer* (1906), 93 S. W. 755.

Michigan Chemical Corpn. v. *G. W. Frady, et al.*, (1955), 289 Pac. (2d) 363.

Van Praag v. *F. R. Corporation* (1947), 7.. N. Y. Supp. (2d) 82.

Bayer v. *Oxford University Press, Inc.* (1946) 61 N. Y. Supp. (2d) 209.

Unless an agreement clearly provides to the contrary, a person selling on a commission basis is entitled to commission when a sale is made, irrespective of when shipment takes place.

Atkinson v. *New Britain Machine Co.* (7th Cir. 1946), 154 F. (2d) 895, p. 901.

Groome v. *Freyn Engineering Co.* (1940), 374 Ill. 113, 28 N. E. (2d) 274 (15) at p. 282.

2. Petitioner says the decision of the Court of Appeals as to whether the complaint stated a sufficient claim for relief, involves an important question of Federal law, and that the decision is in conflict with the decisions of the Court of Appeals of the Ninth Circuit, and cites two cases. Surely, petitioner Brengle cannot be serious in comparing respondent's amended complaint with the garbled "pleadings" in the case of *Patten* v. *Dennis*, U. S. Attorney, 134 F. 2d 137, in which Patton acted as his own attorney; and as to the case of *Pierce* v. *Wagner*, 34 F. 2d 958, respondent has been unable to find this case as cited.

In view of the record of this case as set forth briefly in respondent's statement of the case, it is sheer folly for petitioner to assert that he is not sufficiently linked with

the claim to entitle plaintiff to redress. The contract in question was incorporated as an exhibit in the amended complaint, and it is elementary that if there is any difference between the exhibit and the pleading, that the exhibit controls.

The amended complaint stated a cause of action against defendant-petitioner Brengle, with all the certainty that the ambiguous contract prepared by him reasonably permitted.

The Court said in *Asher* v. *Ruppa*, 7th Cir., 173 F. 2d, 10, at page 12:

> "Plaintiffs are not required to plead all their evidence, and under the rules of civil procedure, there is no pleading requirement of stating facts sufficient to constitute a cause of action; indeed, the only requirement is that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Federal Rules of Civil Procedures, rule 8 (a), 28 USCA. The law is now settled that upon motions to dismiss a complaint on the ground that it does not state a claim upon which relief can be granted, the complaint should be construed in the light most favorable to the plaintiff, with all doubts resolved in his favor and the allegations accepted as true."

Conclusion.

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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